

ESTTA Tracking number: **ESTTA468798**Filing date: **04/24/2012**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

|         |  |             |               |
|---------|--|-------------|---------------|
| Name    | Mr. Tony M Lamoureux   |             |               |
| Entity  | Individual   | Citizenship | UNITED STATES |
| Address | 261 Blackstock Road<br>Birmingham, AL 35209<br>UNITED STATES |             |               |

|                      |   |
|----------------------|---|
| Attorney information | Christopher R. Ganter<br>Christopher R. Ganter, LLC<br>5184 Caldwell Mill Rd. Suite 204-425<br>Birmingham, AL 35242<br>UNITED STATES<br>Crgant@aol.com Phone:205-266-0279 |
|----------------------|---|

**Registration Subject to Cancellation**

|                 |  |                   |            |
|-----------------|--|-------------------|------------|
| Registration No | 3971868  | Registration date | 05/31/2011 |
| Registrant      | Gary D. Osborn<br>4001 McEwen Road, Suite 100<br>Dallas, TX 75244<br>UNITED STATES |                   |            |

**Goods/Services Subject to Cancellation**

Class 005. First Use: 2009/09/01 First Use In Commerce: 2009/09/01  
All goods and services in the class are cancelled, namely: Amino acids for nutritional purposes

**Grounds for Cancellation**

|   |   |
|---|---|
| <i>Torres v. Cantine Torresella S.r.l.Fraud</i>   | 808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)   |
| The registration is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services on or in connection with which the mark is used. | Trademark Act section 14  |
| Priority and likelihood of confusion  | Trademark Act section 2(d)  |
| Other   | Improper Ownership 15 U.S.C. 1051 (a)(1) & (a)(3) & (Anheuser-Busch, Inc. v. The Florists Association of Greater Cleveland, 29USPQ2d 1146 (TTAB 1993)). |

**Mark Cited by Petitioner as Basis for Cancellation**

|                                       |      |                  |      |
|---------------------------------------|------|------------------|------|
| U.S. Application/<br>Registration No. | NONE | Application Date | NONE |
|---------------------------------------|------|------------------|------|

|                   |   |
|-------------------|---|
| Registration Date | NONE  |
| Word Mark         | LIPOTONIX   |
| Goods/Services    | International Class 5. Dietary and nutritional supplements used for weight loss |

|             |   |
|-------------|---|
| Attachments | 042412PetitionToCancel.pdf ( 7 pages )(230572 bytes ) |
|-------------|---|

### **Certificate of Service**

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by USPS Express Mail Post Office to Addressee on this date.

|           |                         |
|-----------|-------------------------|
| Signature | /Christopher R. Ganter/ |
| Name      | Christopher R. Ganter   |
| Date      | 04/24/2012              |

The above-identified Petitioner believes that he will be damaged by the above-identified registration, and hereby petitions to cancel the same under the provisions of 15 U.S.C. § 1064(3).

### **Factual Background**

1. Petitioner is an employee and product formulator of National Medical Resources, Inc. of Birmingham, Alabama. Among other lines of business, National Medical Resources, Inc. is in the business of marketing and selling lipotropic weight loss injections to various doctors and medical clinics around the country.
2. National Medical Resources, Inc. uses compounding pharmacies to mix and prepare their proprietary products. As it relates to this matter, National Medical Resources, Inc. used Registrant for a period of time to mix and prepare its lipotropic weight loss injections.
3. One of National Medical Resources, Inc.'s proprietary injections was initially identified as "NMR-MIC B Lipotropic" by Registrant. Petitioner determined the name "NMR-MIC B Lipotropic" unsuitable for his product formulation.
4. Petitioner created and selected "Lipotonix" as the new trademark for this particular lipotropic weight loss injection product on or around August of 2009. Petitioner personally communicated this fact to Registrant. Directly thereafter, at Petitioner's direction, the product weight loss injection vials bore the mark of Lipotonix upon the adhered label.
5. On June 2, 2011 Registrant filed an application to register the mark Lipotonix (as a standard character mark) under Section 1(b) of the Lanham Act, 15 U.S.C. § 1051(b). On February 15, 2011 Registrant converted its intent to use Section 1(b) trademark application into an application based on current use under 15 U.S.C. § 1051(a) & (d). Based on this application, Registrant obtained U.S. Registration No. 3,971,868 (the "Registration"), which issued on May 31, 2011 for the term Lipotonix used on "Amino Acids for Nutritional Purposes" in International Class 5.

6. Only recently has Petitioner discovered that Registrant improperly and fraudulently registered Lipotonix with the United States Patent and Trademark Office and claimed to be its Owner. Petitioner never consented, waived, assigned, sold, gave permission or in any other way forfeited its ownership of the mark Lipotonix to Registrant.

7. Petitioner's use of its mark Lipotonix has been continuous since August of 2009 up to and including the present day.

### **Standing**

8. 15 U.S.C. §1064 allows "[a] petition to cancel a registration of a mark ... by any person who believes that he is or will be damaged..." As shown above, Petitioner has a "real interest" as the true and rightful owner of Lipotonix. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026 (Fed. Cir. 1999). Further, Petitioner has a "direct and personal stake" in the outcome of this proceeding as to the true and rightful ownership of the trademark Lipotonix. *Id.*

9. Petitioner, as creator, originator and Owner of Lipotonix<sup>1</sup>, has a "reasonable basis for belief of damage" and will be damaged further by Registrant's improper and fraudulent registration of Lipotonix and use of the mark Lipotonix. *Ritchie v. Simpson, supra* at 1025. Such damage includes, but is not limited to, lack of control and use of the trademark of Lipotonix for all such benefits as might naturally inure to the benefit of Petitioner. Additionally, damage suffered by Petitioner includes lost customers and profit due to confusion as to the true source of Lipotonix weight loss injections.

### **Grounds for Cancellation**

10. Petitioner re-alleges and incorporates by reference paragraphs 1-9 above as if they were plead within the paragraphs below.

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<sup>1</sup> Petitioner Lamoureux created and originated a different but the related mark Lipotonix Plus concurrently with the mark Lipotonix (the mark subject to this petition). This is another trademark (Application Serial No. 85463284) that Petitioner Gary Osborn is fraudulently and improperly attempting to the register with the USPTO at this time.

### **First Basis for Cancellation - Fraudulent Registration**

11. On June 2, 2010 Registrant filed its trademark application with the U.S. Patent and Trademark Office which included a sworn declaration signed under penalty of perjury by Ms. Jane Stower, Paralegal. Ms. Stower swore that the Registrant was the “owner of the trademark/service mark sought to be registered” and that “no other person, firm, coporation, or association has the right to use the mark in commerce.”

12. On February 15, 2011, Registrant filed with the U.S. Patent and Trademark Office a 15 U.S.C. § 1051(d) Statement of Use which included a sworn declaration signed under penalty of perjury by Ms. Jane Stower, Paralegal/Executive Assistant. Ms. Stower swore that Registrant was “the owner of the mark sought to be registered” and “believes the applicant to be owner of the trademark/service mark sought to be registered.”

13. Registrant obtained the Lipotonix registration by knowingly making fraudulent and false statements to the USPTO claiming and declaring ownership of the mark Lipotonix. These fraudulent and false statements were made to the USPTO during the process of registering Lipotonix in violation of 15 U.S.C. § 1064(3) which allows cancellation of a “registration [that] was obtained fraudulently”.

14. Upon information and belief, Registrant knew the of the falsity of its statement of ownership contained within its signed declaration of its trademark application on June 2, 2010 and the declaration of ownership contained within its February 15, 2011 Statement of Use, at the time they were made.

15. The U.S. Patent and Trademark Office relied upon Registrant’s material false statements in allowing the registration of the Lipotonix mark. The U.S. Patent and Trademark Office would

not have allowed Registration No. 3,971,868 to issue as valid mark on the principal register absent Registrant's knowingly false statements.

**Second Basis for Cancellation - Improper Claim to Ownership**

16. As grounds for its Petition to Cancel Registration No. 3971868, Petitioner states that Registrant is not the rightful owner of the registered mark as required under § 15 U.S.C. 1051 (a)(1) & (a)(3).

17. Registrant's statements of ownership contained within the declaration of its trademark application and the declaration of its Statement of Use are inaccurate and not true.

18. Petitioner is the proper, rightful and lawful owner of the mark Lipotonix.

**Third Basis for Cancellation - Likelihood of Confusion**

19. Registrant's registration of the mark Lipotonix violates 15 U.S.C. § 1052(d) as the mark is identical to Petitioner's Lipotonix mark.

20. Petitioner's mark Lipotonix was used in the United States and not abandoned and was used prior to Registrant's use.

21. Registrant's use is likely to cause confusion when used on or in connection with the goods or services of Petitioner.

**Fourth Basis for Cancellation – Misrepresentation of Source of Goods**

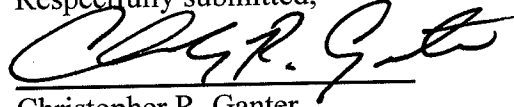
22. Registrant's registration and use of the registered mark Lipotonix is being used so as to misrepresent the source of the goods or services on or in connection with which the mark is used in violation of 15 U.S.C. § 1064(3).

23. Petitioner is the source of the goods bearing the mark Lipotonix.

**WHEREFORE**, Petitioner prays that Registration No. 3,971,868 be cancelled pursuant to 15 U.S. C. § 1064(3) because: 1) the mark Lipotonix was fraudulently registered by

Registrant, 2) Petitioner is the proper, rightful and lawful owner of the mark Lipotonix, 3) Registrant's use of the mark Lipotonix is likely to cause, and has caused, confusion with Petitioner's mark Lipotonix, and 4) Registrant has misrepresented the source of the goods on which the mark Lipotonix is used.

Respectfully submitted,



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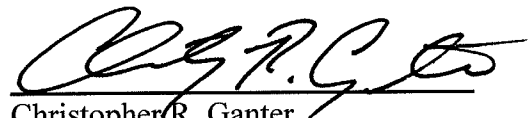
**Attorney for Tony M. Lamoureux**



**CERTIFICATE OF SERVICE**

Pursuant to 37 C.F.R. 2.111, I hereby certify that a true and correct copy of the foregoing Petition To Cancel was served, via Express Mail Post Office to Addressee, on Registrant Gary D. Osborn at the following address:

Gary Osborn d/b/a Apothecure, Inc.  
4001 McEwen Road, Suite 100  
Dallas, Texas 75244

A handwritten signature in black ink, appearing to read 'C.R. Ganter', written over a horizontal line.

Christopher R. Ganter  
Attorney for Tony M. Lamoureux